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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/645,136

08/20/2003

Jeffrey Larson

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7590

08/05/2008

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EXAMINER

PHILOGENE, PEDRO

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

08/05/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/645,136	<b>Applicant(s)</b> LARSON ET AL.	
	<b>Examiner</b> Pedro Philogene	<b>Art Unit</b> 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 2-5, 7-13, 15-18 and 25-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2-5, 7-13, 15-18, 25-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2-5, 7-13, 15-18, 25-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mayer et al. (5,728,046) in view of Smith et al. (7,261,688) in view of Engelhardt et al. (5,027,793) in view of Kohlmann (3,749,088).

Mayer et al disclose a retractor, as best seen in FIG. 1, comprising a frame (5) having a first guide receiving channel (20,21) a first tissue retaining wall (7); and a second tissue retaining wall (18,19) wherein each of the retaining walls has a substantially flat side, as best seen at 25,45, wherein one of the first tissue retaining wall and the second tissue retaining wall is coupled to the frame (5 as it encompasses arms 1,2,3,4,) as best seen in FIG.1 and a first guide (29) having an end, the first guide being sized and dimensioned to be received within the first guide receiving channel, the end being sized and dimensioned to be insertable into a first area of bone; as best seen in FIGS.1-3. The retaining wall has a curved bottom surface, as best seen in FIG.1. The retractor further comprising a frame (5) having a mechanism that holds the retaining walls apart from each other, wherein the first and second guide receiving channels (20, 21) comprises slot disposed in the frame. The first and second tissue retaining walls defining a space (between blades 7, 18, 19), the first and second tissue retaining walls being movably coupled (via holders 8, 9 on the frame) to one another so that the first

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and second tissue retaining walls are moveable between a closed position and an open position, as set forth in column 4, lines 1-6, the space being larger when the first and second tissue retaining walls are in the open position as compared to the closed position (by moving blades 18, 19 away from blade 7).

It is noted that Mayer et al did not teach of a first and second walls that are movably coupled and a hinge that joins the first and second walls and first and second walls that are nested relative to one another; as claimed by applicant. However, in a similar art, Smith et al evidence the use of a retractor with such characteristics to increase the size of the working channel while minimizing trauma to skin and tissue.

Therefore, given the teaching of Smith et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Mayer et al, as taught by Smith et al to increase the size of the working channel while minimizing trauma to skin and tissue.

It is noted that the above combination of references does not teach of at least a portion of the guide extends through the top surface of the frame and though the first guide receiving channel; as claimed by applicant. However, in similar art, Engelhardt et al provide the evidence the use of a retractor with a frame having guide receiving channels and first and second guides received therein to temporarily attach the retractor to bone.

Therefore, given the teaching of Engelhardt et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the

device of Mayer, as taught by Engelhardt et al to temporarily attach the retractor to bone.

It is also noted that the above combination of references did not teach of plurality of finger processes extending from the distal portions of one of the first and second retaining walls, as claimed by applicant. However, in similar art, Kohlmann provides the evidences of the use of retaining walls (28, 29, 30) and a plurality of removable finger processes (54) extending from the distal end of wall (30) to provide a retractor that is readily adjustable to several positions for adjusting the location and amount of tractive force applied to the tissue surrounding an incision during surgery.

Therefore, given the teaching of Kohlmann, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Mayer et al, as taught by Kohlmann to provide a retractor that is readily adjustable to several positions for adjusting the location and amount of tractive force applied to the tissue surrounding an incision during surgery.

### ***Response to Amendment***

Applicant's arguments with respect to claims 2-5, 7-13, 15-18, 25-27 have been considered but are moot in view of the new ground(s) of rejection. First, the examiner would like to apologize for indicating the allowability of claim 13 in the last office action. However, a closer and/or broader reading of claim 13, shows that claim 13 could be rejected further in view of Kohlmann. Since applicant discloses the fingers as being wide, narrow, long or short, closely spaced or widely spaced, flat or round, and so on;

the reference to Kohlmann discloses a plurality of fingers (54) that are at least long and flat. Therefore, using Kohlmann, in combination, to reject claim 13 is proper. The Terminal Disclaimer filed 4/11/08 has been approved.

### ***Conclusion***

A shortened statutory period for reply to this action is set to expire THREE MONTHS from the mailing date of this action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pedro Philogene/  
Primary Examiner, Art Unit 3733  
August 1, 2008